(2)

No. 99-741

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DR. ARIE HAREL,

Petitioner,

v.

DR. FRANCIS LAWRENCE and JOSEPH SENECA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT TO QUESTION PRESENTED

Did the Court of Appeals err by analyzing petitioner's personal liability claims under § 1983 against the individual respondents under an actual knowledge and acquiescence standard?

LIST OF PARTIES TO THIS PROCEEDING*

Petitioner:

DR. ARIE HAREL

Respondents:

DR. FRANCIS LAWRENCE
DR. JOSEPH SENECA

---

* Rutgers, The State University was a party defendant in the proceedings below. The United States District Court for the District of New Jersey granted Rutgers, The State University's motion for summary judgment on all counts. The Third Circuit affirmed and Petitioner Dr. Arie Harel has not sought to challenge that ruling in his petition to this Court. Thus, Rutgers is not a respondent herein.

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Respondents Francis Lawrence and Joseph Seneca respectfully request that this Court deny the petition for a writ of certiorari. This is a garden variety employment case and the petition raises no "compelling reasons" for granting a writ of certiorari. Rather, it simply challenges the lower courts' correct application, to the particular facts of this case, of well-settled Supreme Court and Courts of Appeals decisions governing the personal liability of individual supervisors under 42 U.S.C. § 1983. As shown herein, the decision of the Third Circuit below follows those of this Court, is consistent with the standard applied by other Courts of Appeals and should be left undisturbed.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner, Dr. Arie Harel, instituted this action on October 6, 1995 against Rutgers, The State University; its President, Dr. Francis Lawrence; and its Executive Vice President, Dr. Joseph Seneca. In his Amended Complaint (JA698)[1], filed on August 19, 1996, Harel alleged, *inter alia*, that respondents violated 42 U.S.C. § 1983 by denying him equal protection of the laws on the basis of his national origin as guaranteed by the Fourteenth Amendment to the United States Constitution. More specifically, Harel alleged that he was denied tenure and promotion to the position of Associate Professor in 1993 and again in 1995 because of his Israeli national origin. Further,

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1. "JA" refers to the Joint Appendix filed with the United States Court of Appeals for the Third Circuit; "Pet. App." refers to the Appendix to the Petition; "PW" refers to the Petition for a Writ of Certiorari filed herein; and "PB" and "PRB," respectively, refer to Harel's Appellant's Brief and Appellant's Reply Brief filed with the Third Circuit.

Harel alleged that this denial was part of a practice and custom by respondents of applying more stringent standards to the consideration of Israeli candidates for promotion and tenure than to other candidates. In addition, Harel alleged that the actions of respondents Seneca and Lawrence in recommending against Harel's candidacy for promotion and tenure "were intentionally discriminatory", "intentionally carried forward the documented and known effects of discrimination on the basis of national origin which occurred at earlier stages of the review process" and were motivated by "malice and prejudice." (JA698, 702 at ¶¶33, 34 and 37).

Respondents denied all material allegations, and specifically denied that Harel was treated differently on the basis of his national origin when he was evaluated for promotion. Instead, as respondents demonstrated in their motion for summary judgment, Harel was not promoted because the quantity and impact of his scholarship did not satisfy the University's promotion standards (Pet. App. C-39).

In its April 24, 1998 Opinion and Order, the district court granted summary judgment to Rutgers and respondents Seneca and Lawrence dismissing all of Harel's claims (Pet. App. B-1).[2] With respect to Harel's § 1983 claim against Rutgers, the district court concluded that Harel had failed to produce evidence sufficient to support a rational inference that a policy or custom of anti-Israeli discrimination existed at Rutgers, or that he was denied tenure as the result of such a policy or custom and, therefore, dismissed Harel's claim against the University (Pet. App. C-34 - C-36). Consistent with the explicit allegations of the Amended Complaint, the district court treated Harel's claim that respondents Lawrence and Seneca's

2. The decision of the district court is reported at 5 F. Supp. 2d 246 (D.N.J. 1998).

actions were intentionally discriminatory not as a claim of supervisory liability, but as an assertion that they personally committed a constitutional tort by recommending against Harel's promotion due to anti-Israeli animus (Pet. App. C-36). The district court considered Harel's allegations that procedural deviations at the lower levels of the evaluation process evidenced anti-Israeli animus and concluded that Harel had failed to produce any evidence linking respondents Lawrence or Seneca to "alleged deviations from the standard consideration procedures." (Pet. App. C-40 - C-41). Rejecting Harel's contention that Lawrence and Seneca recommended against his promotion as a result of anti-Israeli bias, the court concluded that "Harel has failed to produce evidence to allow a reasonable fact finder to discredit the defendants' proffered reason for again denying him tenure in 1995." (Pet. App. C-43).[3] Further, the court concluded that there was "no evidence in the record from which a reasonable juror could build the bridge to the circumstantial conclusion that the acts of the individual defendants were a pretext to discriminate against Harel because of his nationality" and, therefore, granted summary judgment dismissing Harel's § 1983 claim against respondents Lawrence and Seneca (Pet. App. C-44).

Harel appealed to the United States Court of Appeals for the Third Circuit from the April 24, 1998 decision. Consistent with the allegations of his Amended Complaint that respondents Lawrence and Seneca had themselves intentionally discriminated against him, Harel did not contend on appeal that the district court erred by treating his § 1983 claims against respondents as being premised upon a theory of direct, rather than supervisory, liability. Nor did Harel contend that the

3. The district court dismissed Harel's § 1983 claim relating to the 1993 promotion evaluation on the ground that it was barred by the statute of limitations (Pet. App. C-33).

individual liability under § 1983 of those respondents should be measured under a deliberate indifference standard (PB27 and PRB17-20).

By Memorandum Opinion dated August 4, 1999, the Third Circuit affirmed the judgment of the district court in its entirety (Pet. App. A-1 - A-9).[4] The Third Circuit held:

> . . . Harel did not produce evidence to indicate that his deprivation of tenure was a direct result of an official Rutgers policy or custom against persons of Israeli national origin and he did not produce evidence that President Francis Lawrence and Vice-President Joseph Seneca, the individual defendants, had actual knowledge of any discriminatory conduct against him or that they acquiesced in any such conduct and as a result Harel failed to establish his § 1983 claim.

(Pet. App. A-4 n.2).

Harel's new argument that the Third Circuit erred by failing to assess the § 1983 personal liability of respondents Lawrence and Seneca under a deliberate indifference standard is the sole issue which he asks this Court to consider.

B. Facts

Harel was born in Czechoslovakia and became an Israeli citizen in 1948 (Pet. App. C-2). He was hired by Rutgers in September 1985 as an Adjunct Assistant Professor (Pet. App.

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4. Since Harel has not petitioned this Court for review of the lower courts' rejection of his claims against Rutgers, the University no longer is a party to this action. Drs. Lawrence and Seneca are the only remaining respondents.

C-2) and was appointed to the position of Assistant Professor in July 1987 (Pet. App. C-2).

Tenure Process at Rutgers

Rutgers utilizes a multi-level evaluation process to determine whether to award tenure to members of its faculty. The University Policy with Respect to Academic Promotions ("Policy") recognizes that great care must be exercised in promoting faculty to the tenured ranks because the grant of tenure is the most critical step in the promotion process (JA110). The Policy provides that only "those faculty members who have made the most important contributions to the University and have discharged their duties with the greatest distinction will be considered for [tenure]. . . . Advancement to a higher rank is not automatic." (Pet. App. C-2). Further, the Policy provides that teaching, scholarship, and service should be considered in deciding whether to grant tenure (Pet. App. C-2). Under the Policy, the research and scholarly accomplishments of a candidate for promotion to the rank of Associate Professor with tenure should have a national impact upon the candidate's discipline (JA106). The Policy explicitly directs evaluators to utilize subjective judgment in assessing the qualifications of candidates for promotion (JA108-09).

The first evaluation is conducted by tenured faculty from the candidate's academic department (Pet. App. C-4).[5] A positive departmental recommendation requires a positive vote by a minimum of two-thirds of those voting (Pet. App. C-5). The candidate's promotion packet, including the departmental

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5. In the discretion of the candidate's department, a reading committee may be appointed to review the candidate's scholarly work and prepare a written assessment thereof for the department's consideration (JA139).

report, is then submitted to the dean's Advisory Committee on Appointments and Promotions ("A&P") (Pet. App. C-5). After receiving the advice of the A&P Committee, the dean evaluates the candidate and makes an independent recommendation concerning the candidate's promotion (Pet. App. C-5). If the recommendations from the dean and the departmental committee both are negative, the candidate's promotion packet is not further evaluated and the candidacy fails (JA126, 141, 374).

If either the dean's or the departmental committee's evaluation is positive, the candidate's promotion packet advances to the next level, the Promotion Review Committee ("PRC") (Pet. App. C-5). The PRC evaluates candidates from a University-wide perspective (Pet. App. C-5). The members of the PRC exercise independent judgment as to the candidate's qualifications and then make a collective recommendation to the University President on whether to grant tenure and/or promotion (Pet. App. C-5 - C-6).

The University President engages in an independent review of each candidate, and then makes a recommendation whether to grant tenure and/or promotion to the University's Board of Governors, which by statute has the sole authority to grant tenure and promotion within the tenured ranks (Pet. App. C-6).

1993 Evaluation for Tenure

Harel was evaluated for tenure in the 1992-93 academic year (Pet. App. C-6). Since his prior unsuccessful candidacy in 1991[6], Harel produced only two refereed journal articles, one

6. Harel did not receive tenure after an evaluation in 1991, but never grieved the denial, filed an administrative charge or lawsuit, or otherwise contended that the denial was unlawful or discriminatory (Pet. App. C-6).

of which was co-authored. Together, these articles totaled six pages (*compare* JA70 at ¶49 with JA594 at ¶49). Harel's promotion packet included fourteen letters from external evaluators, some of which supported promotion and others expressed concern with Harel's relatively small number of publications (Pet. App. C-7).

Dr. Nabil Adam, the chair of Harel's academic department, appointed two tenured faculty members from Harel's department, Dr. Michael Katehakis and Dr. Ted Szatrowski, to serve as Harel's reading committee (Pet. App. C-7). The department voted in favor of tenure; however, the departmental report rated Harel's scholarship as only "average to above average" (Pet. App. C-7 - C-8). While the A&P Committee and the Dean supported tenure, the PRC recommended against tenure, concluding that: "Professor Harel's record since being appointed as Assistant Professor indicates only a moderate publication level and there is some concern about the long term significance and impact of his work. . . ." (Pet. App. C-8). President Lawrence concurred (Pet. App. C-8). Harel was informed on April 6, 1993 that he had not been granted tenure (Pet. App. C-8).

1993 Grievance

On August 18, 1993, Harel filed a grievance pursuant to the University's collectively-negotiated agreement with the local chapter of his union, the American Association of University Professors ("AAUP agreement"), concerning the 1993 tenure denial (Pet. App. C-8 - C-9).[7] He complained that a rigorous

7. Harel's petition does not seek review of the lower courts' ruling that his claims concerning the 1993 evaluation are time-barred (*See* Pet. App. A-4 n.2 and C-33). However, because Harel asserts that his 1993 evaluation and grievance are relevant to the assessment of the respondents'§ 1983 liability for his 1995 tenure denial, we include a brief discussion here.

and fair review of his work had not occurred and that there were procedural errors in the handling of certain materials that he deemed favorable. Nowhere in his grievance did Harel charge that the tenure denial was motivated by national origin discrimination (Pet. App. C-9).

The validity of all but three of Harel's grievance allegations never was determined by the faculty grievance committee because Harel voluntarily withdrew them as part of a remand agreement with the University before findings were made (Pet. App. C-9; JAA186). In its findings concerning the three remaining allegations, the grievance committee concluded that Harel had failed to prove all but one, *i.e.*, that a single member of Harel's department, Professor Szatrowski, had acted with enmity during Harel's 1993 review (JA190, 195).

Under the remand agreement (JA186), Harel's promotion packet would be returned to his department for another evaluation in which Professor Szatrowski would not participate (Pet. App. C-9 - C10). The remand agreement further provided that the decision on remand would be based on the materials submitted in the 1993 promotion packet, a letter submitted by Harel to update the status of the listed works in progress, and a personal statement. Pursuant to the remand agreement, Harel's promotion packet for the remanded evaluation also contained a copy of the grievance committee's findings (Pet. App. C-10). Thus, with respect to Harel's 1993 grievance allegations, his promotion packet for the remanded evaluation showed only that a single allegation had been sustained against one department member who was recused from participation in the 1995 remanded evaluation.

1995 Evaluation for Tenure

Harel received a remanded evaluation during the 1994-95 academic year in accordance with the remand agreement. In a memorandum updating his scholarship since the 1993 evaluation, Harel listed only one new publication and the acceptance for publication of one previously-listed paper (Pet. App. C-10). Dr. Hannoch Levy, an Israeli, and Dr. Ronald Armstrong, a non-Israeli, were appointed to serve on Harel's reading committee (Pet. App. C-11). Both are Harel's friends and "close colleagues" (JA326-27). In the departmental vote taken in December 1994, four members of the department voted to recommend Harel for tenure and promotion, three voted against and one abstained (Pet. App. C-11). Pursuant to the University's Academic Reappointment/Promotion Instructions, two-thirds of the department's members must vote in favor of a candidate for the department to recommend promotion and tenure (Pet. App. C-5). Since fewer than two-thirds of Harel's department voted in favor of promotion, the department did not recommend that Harel be awarded tenure and promotion (Pet. App. C-11). The A&P Committee and the Dean, P. George Benson, recommended promotion (Pet. App. C-11 - C-12).

By memorandum to University President Lawrence dated March 23, 1995, the PRC, through its non-voting Chair, Dr. Joseph Seneca, advised that it did not recommend that Harel be promoted with tenure (Pet. App. C-12). In that memorandum, the PRC stated that:

> Professor Harel's record over this period does not demonstrate sufficiently substantial productivity and, although his contributions are respected by external peers, it is not apparent from the record that his work has had a significant national impact on developments in his field.

(Pet. App. C-12).

President Lawrence also declined to support Harel for promotion and tenure (Pet. App. C-12). The University notified Harel that he had not been granted tenure on April 14, 1995 (Pet. App. C-12).

1995 Grievance

On May 19, 1995, Harel filed a grievance under the AAUP agreement concerning the results of the remanded evaluation (Pet. App. C-12). He charged that the PRC had evaluated the materials submitted in support of his candidacy in an arbitrary and capricious manner and that the PRC's conclusion that his scholarship lacked sufficient productivity and significant impact contradicted the findings reached at other levels of the evaluation process (Pet. App. C-12). He also alleged that certain members of his department had acted in an arbitrary and capricious manner by changing from a positive vote in 1993 to a negative vote in 1995 (Pet. App. C-13). In addition, he accused the University of not taking proper steps to locate two "missing" letters in support of his 1990-91 candidacy (Pet. App. C-13). Finally, Harel charged that Department Chair Adam had omitted from his promotion packet on remand a positive internal letter and, instead, had placed it in supplementary materials not available to the PRC for review (Pet. App. C-13). Once again, Harel nowhere stated in this second grievance that the tenure denial was motivated by national origin discrimination (Pet. App. C-13).

As provided in the AAUP agreement, Harel's grievance was heard by the Faculty Appeals Board ("FAB"), a body of appointed faculty members charged with hearing grievances from remanded evaluations (Pet. App. C-13). Whether or not the FAB finds that there was error in a remanded evaluation, it may either order another evaluation or recommend to the President that the candidate receive tenure (Pet. App. C-13).

In its recommendations issued on June 22, 1995, the FAB rejected Harel's allegation that the PRC acted in an "arbitrary and capricious" manner in denying tenure (Pet. App. C-13). While asking the President to consider its ultimate recommendation, the FAB concluded that:

> There is no evidence that the PRC did not carefully consider the materials provided in Prof. Harel's promotion packet in making its decision.

(JA212).

The FAB also rejected Harel's allegation that "some" members of his department acted in an arbitrary and capricious manner because they did not vote to support him for tenure (Pet. App. C-13). As to Harel's allegation that the University did not take "sufficient steps" to obtain two "missing" outside reference letters, the FAB noted that one of the letters was obtained by the University, and included in the remand packet (JA214). The FAB also rejected Harel's belated claim of "Enmity by an evaluator during 1990-1991 [sic] tenure review" (JA216).

The FAB found that an internal letter of evaluation (*i.e.*, one from Benjamin Avi-Itzak, Harel's friend and colleague) was placed in "supplementary materials" (Pet. App. C-14). However, Harel conceded that "supplementary" packet material is available to, and reviewed by, the PRC (JA307-08). After rejecting Harel's key allegations (*i.e.*, alleged arbitrary action and the charge of "enmity"), the FAB nevertheless recommended that Harel be awarded tenure (Pet. App. C-14).

Thereafter, Harel's tenure candidacy was submitted to President Lawrence for review, as provided for in the AAUP Agreement (Pet. App. C-14). By correspondence to Harel dated

July 26, 1995, President Lawrence disagreed with the FAB's recommendation, stating, *inter alia*, that "the record of accomplishments presented is not sufficient to support [promotion]" (Pet. App. C-14). The Board of Governors accepted President Lawrence's recommendation not to award Harel tenure or promotion (JA334).

On September 13, 1995, Harel filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging for the first time, *inter alia*, that he was denied tenure in 1995 on account of his national origin (Pet. App. C-15).

REASONS FOR DENYING THE WRIT

The Lower Courts' Decision That Harel's § 1983 Claim Against Respondents Lawrence And Seneca Failed For Lack Of Evidence That They Had Actual Knowledge Of Any Discriminatory Conduct Against Him Or Acquiesced In Any Such Conduct Is A Correct Application Of The Decisions Of This Court To The Specific Facts Of This Case And Is Consistent With The Decisions Of The Other Courts Of Appeals.

Harel's petition contends that the Third Circuit's ruling below — that his § 1983 claim against respondents Lawrence and Seneca failed for lack of evidence that they had actual knowledge of alleged discriminatory conduct against him or acquiesced in such conduct (Pet. App. A-4 n.2) — "ignores well-settled Supreme Court and inter-circuit authority governing supervisory liability under § 1983" and marks a split among the Circuits that should be resolved by a grant of certiorari in this case (PW14-15).

The sole identified basis for Harel's contention that the Third Circuit's decision ignores the decisions of this Court is

his assertion that *Canton v. Harris*, 489 U.S. 378, 388 (1989), held and, thus, required the Third Circuit to hold below, that individual governmental officials may be personally liable under § 1983 for "deliberate indifference" to constitutional rights (PW15). Harel's contention that the Third Circuit's decision conflicts with those of other Courts of Appeals concerning the scope of "*Canton*'s deliberate indifference test" appears to be based upon the argument that the Third Circuit failed to apply a deliberate indifference test in this case and, in its other decisions, has declined to apply a deliberate indifference analysis in as broad a range of circumstances as have other Courts of Appeals. As shown below, Harel's petition must be denied because both of these contentions are wrong.

At the outset, however, Harel's petition must be denied for another reason: he never presented to the courts below his contention that his personal liability claims against respondents Lawrence and Seneca should be evaluated under a "deliberate indifference" standard. Harel's Amended Complaint expressly alleges that respondents Lawrence and Seneca *directly* participated in *intentional* misconduct against him (JA702 at ¶¶33, 34 and 37). Following the district court's dismissal of his § 1983 claim on summary judgment, on appeal Harel did not further press his direct tort theory against respondents, but instead, urged a supervisory liability theory. In his brief before the Third Circuit, Harel did not ask the court to evaluate his claims against respondents Lawrence and Seneca under a deliberate indifference standard. Instead, Harel made the following argument regarding the personal liability of respondents Lawrence and Seneca:

> To sustain constitutional claims against individual state actors, Dr. Harel must show that they intentionally acted in derogation of a clearly established right of which a reasonable person in

> their position would have had knowledge. Dr. Harel may also prevail against these defendants by establishing that they knowingly failed to act in a manner which permitted others, under their supervision or direction, to violate such rights. *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988) (requiring allegations of individual involvement or acquiescence to be made with reasonable particularity).[8]

(PB27). Moreover, Harel's reliance on *Rode* cannot be viewed as urging the Third Circuit to apply a deliberate indifference standard because *Rode*, 845 F.2d at 1207, expressly requires a showing of "actual knowledge and acquiescence" to make out a supervisory liability claim. Accordingly, it is clear that Harel did not raise his deliberate indifference theory below. Plainly, Harel twice has sought to shift the theory of his § 1983 claim in order to obtain another bite at the apple.

Harel's failure to raise his "deliberate indifference" argument before the lower courts requires that the petition be denied. It is well-settled that this Court will not consider issues which were not presented or resolved in the courts below. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("[O]rdinarily this Court does not decide questions not raised or resolved in the lower court."); *Duignan v. United States*, 274 U.S. 195, 200 (1927) (same). Harel should not be permitted to argue for the first time in his petition that the Third Circuit should have applied a "deliberate indifference" standard for supervisor

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8. Contrary to Harel's reading of *Rode*, the Third Circuit held in that pre-*Canton* decision that the personal involvement necessary to hold a defendant liable in a § 1983 action may be shown "through allegations of personal direction or of actual knowledge and acquiescence." 845 F.2d 1195, 1207 (3d Cir. 1988).

liability, rather than the standard that Harel himself urged that court to apply.

Accordingly, the petition must be denied.

1. The Third Circuit's Decision Below Is Consistent With This Court's Decisions Concerning Personal Liability Under § 1983.

If this Court proceeds to consider the new argument raised in Harel's petition, his assertion that the Third Circuit's ruling below conflicts with *Canton v. Harris* is wrong. Contrary to Harel's contention, *Canton* did not address the liability under § 1983 of individual governmental supervisors. Rather, the *Canton* Court was presented with, and decided in the affirmative, the question whether a municipality may be held liable under §1983 for its failure to train municipal employees where that failure both causes a constitutional deprivation and reflects a deliberate indifference to the constitutional rights of its inhabitants. 489 U.S. at 392. No decision of this Court has held that the "deliberate indifference" standard is the sole test which must be applied regardless of the factual circumstances presented in considering the personal liability of a governmental supervisor under § 1983. Therefore, the decisions of this Court did not require the Third Circuit to apply a deliberate indifference test.

Contrary to Harel's contention, the decision below is fully consistent with the decisions of this Court. To establish personal liability in a § 1983 action, it must be shown that "the official, acting under color of state law, caused the deprivation of a federal right." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Hafer v. Melo*, 502 U.S. 21, 25 (1991). In considering the circumstances under which a governmental supervisor may be

held personally liable under 42 U.S.C. § 1983, the starting point must be the statute itself, which provides, in relevant part:

> [e]very person who under color of [law] subjects, or causes to be subjected, any . . . person within the jurisdiction [of the United States] to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law [or] suit in equity . . .

As this Court explained in *Rizzo v. Goode*, 423 U.S. 362, 370-371 (1976): "[t]he plain words of the statute impose liability . . . only for conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and the laws." Thus, this Court has rejected § 1983 claims premised on theories of respondeat superior and held that a defendant in a civil rights action must have personal involvement in the alleged wrongs in order to be held liable. *Monell v. Department of Social Services*, 436 U.S. 658, 691-693 (1978); *Rizzo v. Goode*, 423 U.S. at 370-371; *Parratt v. Taylor*, 451 U.S. 527, 537 n.3 (1981). It follows that a §1983 plaintiff seeking to attach liability to a supervisor for the acts of one of his or her subordinates "may not rest on the [supervisory] relationship alone; both fault and causation *as to the acts or omissions of the* [supervisor himself] must be proved." *Canton*, 489 U.S. at 394 (O'Connor, J., concurring in part and dissenting in part) (emphasis in original).

Thus, the Third Circuit's ruling that Harel's § 1983 claim is deficient because he failed to produce evidence that respondents Lawrence and Seneca had actual knowledge of or acquiesced in alleged discriminatory conduct purportedly perpetrated by lower level evaluators is fully consistent with this Court's conclusion in *Rizzo v. Goode* that personal

involvement of governmental officials must be shown to support individual liability under § 1983.

2. The Third Circuit's Decision Below Is Consistent With The Decisions of the Other Courts of Appeals.

Moreover, Harel's contention that a split exists between the Third Circuit and the other Courts of Appeals concerning the supervisory liability standards under § 1983 simply is wrong. As shown above, the Third Circuit did not reject or refuse to apply a deliberate indifference standard in this case. The court had no occasion to consider the appropriateness of such a standard because, from the filing of his Amended Complaint and throughout the proceedings before the Third Circuit, Harel never pursued his § 1983 claim against respondents on a deliberate indifference theory. Instead, he first asserted that respondents intentionally overlooked the alleged misconduct of lower level evaluators and recommended against Harel's promotion because of their own intentional discriminatory animus, and later contended that they knew of and acquiesced in subordinates' misconduct. To debate whether the Third Circuit would have deemed it appropriate to apply a deliberate indifference standard had Harel presented such a theory of liability is an exercise in conjecture that does not warrant a grant of certiorari.

As should be expected given the widely-varying factual patterns and theories of liability presented, the decisions of the Third Circuit analyzing the nature and extent of personal involvement necessary to support the personal liability of supervisors under § 1983 have defined a range of circumstances in which the necessary involvement may be shown. The Third Circuit has held that personal involvement may be shown "through allegations of personal direction or of actual

knowledge and acquiescence," *Rode v. Dellarciprete*, 845 F.2d at 1207, "or through direct discrimination by the supervisor." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990). Further, the Third Circuit has applied a deliberate indifference standard in assessing the individual liability of government supervisors in appropriate §1983 cases. *See e.g.*, *Sample v. Diecks*, 885 F.2d 1099, 1116-18 (3d Cir. 1989) (In the context of a §1983 action against prison officials for unconstitutional detention, applying the "deliberate indifference" standard as established in *Canton* to the assessment of the individual liability of supervisory public officials.); *Stoneking v. Bradford Area School District*, 882 F.2d 720, 725 (3d Cir. 1989) (Holding, under *Canton*, that a school official may be held liable in an individual, as well as an official, capacity when the official, with deliberate indifference to the consequences, establishes or maintains a policy, practice or custom that plays an affirmative role in causing a deprivation of the constitutional rights of a student.), *cert. denied*, 493 U.S. 1044 (1990); *Black v. Indiana Area School Dist.*, 985 F.2d 707, 711-13 (3d Cir. 1993) (Holding that plaintiffs had failed to establish the individual §1983 liability of the supervisor defendant under deliberate indifference standard.); *Carter v. City of Philadelphia*, 181 F.3d 339 (3d Cir. 1999) (Holding, in the context of a claim against policymakers in the District Attorney's Office in their personal capacities for failure to train or supervise municipal employees, that liability under § 1983 requires a showing that the failure amounts to "deliberate indifference" to the rights of persons with whom these employees will come into contact.), *cert denied*, __ U.S. __ No. 99-481, 1999 U.S. LEXIS 7545 (Nov. 15, 1999).

In other decisions, although recognizing the continued viability of the deliberate indifference standard, the Third Circuit has held that theory inapplicable where the absence of evidence

showing a pattern of subordinate misconduct made it inappropriate to impute constructive knowledge thereof to the supervisor. *See Brown v. Grabowski*, 922 F.2d 1097, 1120 n.16 (3d Cir. 1990), *cert. denied*, 501 U.S. 1218 (1991); *Baker v. Monroe Township*, 50 F.3d 1186, 1191 n.3 (3d Cir. 1995).

Fully consistent with the Third Circuit, depending on the facts presented, other Courts of Appeals have concluded that personal involvement sufficient to support individual liability of a supervisor under § 1983 may be established through involvement ranging from direct participation to deliberate indifference. *See Barreto-Rivera v. Medina-Vargas*, 168 F.3d 42 (1st Cir. 1999) (Holding that § 1983 claim against individual supervisory official may be proved upon a showing that the official directly participated in the actions complained of, knew of subordinates' unconstitutional behavior and condoned or tacitly authorized such conduct, or had a basis for knowing of subordinates' misconduct and acted with deliberate indifference to the consequences.); *Sealey v. Giltner*, 116 F.3d 47, 51 (2d Cir. 1997) ("A supervisory official is liable for a constitutional violation if he or she (1) directly participated in the violation; (2) failed to remedy the violation after learning of it through a report or appeal; (3) created a custom or policy fostering the violation or allowed the custom or policy to continue after learning of it; or (4) was grossly negligent in supervising subordinates who caused the violation."); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996) (Holding that supervisors will be liable under § 1983 only upon proof of their direct culpability in causing injury to the plaintiff which may be shown by evidence that the supervisor either: (1) directly authorized subordinates' conduct, (2) expressly condoned by inaction a known pattern of comparable conduct, or (3) knew or reasonably should have known of a comparable pattern of misconduct and in the face

of that knowledge took no action to stop it but remained deliberately indifferent to it.), *cert. denied*, 519 U.S. 819 (1996); *Sanders v. English*, 950 F.2d 1152, 1159-60 (5th Cir. 1992) (Supervisory official may be held liable under § 1983 for wrongful acts of subordinates if he or she knew about the conduct and facilitated it, approved it, condoned it, or turned a blind eye for fear of what he or she might see.); *Salehpour v. University of Tennessee*, 159 F.3d 199 (6th Cir. 1998) (Holding that plaintiff must prove that supervisors did more than play a passive role in the alleged violation or showed mere tacit approval of the events for individual liability under § 1983 to attach. Plaintiff must show that supervisors otherwise encouraged or condoned the actions of the other defendants.), *reh'g en banc denied*, 1998 No. 97-5468 U.S. App. LEXIS 31335 (6th Cir. Oct. 29, 1998), *cert. denied*, __ U.S. __, 143 L. Ed. 2d 793 (1999); *Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1997) (Holding that liability of supervisors for conduct of subordinates under § 1983 must be predicated on personal involvement which can be shown in a number of ways: "supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference."); *Ripson v. Alles*, 21 F.3d 805, 809 (8th Cir. 1994) (Holding that for a supervisor to be held individually liable for the acts of a subordinate, something more must be shown than merely the existence of the supervisor-subordinate relationship and mere negligence in failing to detect and prevent a subordinate's conduct is not enough for liability under § 1983 to attach. The supervisor must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what [he] might see.), *reh'g denied*, 93-1972SIDM 1994 U.S. App. LEXIS 12756 (8th Cir. June 1, 1994); *Watkins v. City of Oakland, Cal.*, 145 F.3d 1087, 1093 (9th Cir. 1998) (Holding that a supervisor can be liable under § 1983 in his individual capacity for (1) his own culpable action

or inaction in the training, supervision or control of his subordinates, (2) for his knowing acquiescence in the constitutional deprivation, or (3) for conduct that showed a reckless or callous indifference to the rights of others.); *Green v. Branson*, 108 F.3d 1296, 1302 (10th Cir. 1997) (To establish a supervisor's liability under § 1983, the plaintiff must show that the supervisor either (1) personally participated in the constitutional deprivation, (2) controlled or directed subordinates to commit the constitutional deprivation, or (3) failed to adequately supervise.); *Jojola v. Chavez*, 55 F.3d 488, 490 (10th Cir. 1995) (To impose individual liability on the defendants under § 1983, plaintiff must allege and prove that defendants "actually knew of and acquiesced in [the subordinate's] behavior."); *Braddy v. Florida Dept. of Labor & Employment Sec.*, 133 F.3d 797 (11th Cir. 1998) (Supervisory liability under § 1983 occurs either when the supervisor personally participated in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation. The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation and he fails to do so.).

In sum, decisions of the other Courts of Appeals are entirely consistent with the decisions of the Third Circuit. All of the Circuits recognize that the showing of fault and causation sufficient to justify the imposition of § 1983 liability upon a supervisor for the conduct of subordinates necessarily varies based upon the nature of the factual scenario presented. Further, all of the Circuits apply slightly varying tests depending upon the facts alleged. Quite simply, there is no split among the Circuits on this issue.

Harel also contends that a footnoted comment by a Third Circuit panel in *Baker v. Monroe Township*, 50 F.3d at 1194 n.5, demonstrates that a split exists among the Circuits because "the Third Circuit has expressly applied a narrower liability test than other Circuits." (PW15). This contention is wrong.

Harel correctly notes that the *Baker* panel stated that "other circuits have developed broader standards for supervisory liability under § 1983", *Baker*, 50 F.3d at 1194 n.5, than the actual knowledge and acquiescence standard applied in *Baker*. However, earlier in its opinion, 50 F.3d at 1191 n.3, the *Baker* Court noted that a supervisor also could be held liable under the principles applied in *Stoneking v. Bradford Area School District*, 882 F.2d at 725 (applying deliberate indifference standard to §1983 claims against individual supervisor), but that the facts before the court did "not implicate such a theory." Since the *Baker* Court held that the evidence showed the supervisor defendant did have actual knowledge of the subordinates' conduct, 50 F.3d at 1193-94, and there is no indication that the court was presented with an argument that a deliberate indifference standard should be applied to those facts, the footnoted comment upon which Harel relies is obiter dictum. Moreover, in its post-*Baker* decision in *Carter v. City of Philadelphia*, 181 F.3d 339 at 356, the Third Circuit reaffirmed its holding in *Sample v. Diecks*, 885 F.2d at 1118 (applying *Canton*'s deliberate indifference standard to § 1983 personal liability claim).

In any event, the Third Circuit's decision below, not the *Baker* Court's dictum, is the subject of Harel's petition. In this case, the Third Circuit's decision is not the product of a split among the Circuits concerning the personal liability standard under § 1983. Rather, the Third Circuit evaluated the evidence of record under the particular theory of liability urged by Harel

himself and concluded that his § 1983 claim against respondents was not supported by the record.

Thus, contrary to Harel's contention, from the starting points provided by this Court's decisions, the case-by-case evolution of the Third Circuit's decisional law defining the relationship that must exist between a supervisor's action or inaction and a subordinate's constitutional violation to warrant supervisory liability under § 1983 is consistent with the decisions of this Court and the other Circuits. Accordingly, Harel's petition must be denied.

3. The Petition Must Be Denied For Other Reasons.

Even if the Third Circuit should have applied a "deliberate indifference" standard, rather than an "actual knowledge and acquiescence" standard, this case is not worthy of certiorari. This Court has made clear that "[c]ertiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' " *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951) [citations omitted]. This case involves the simple application of the law to a discrete factual scenario. It does not involve principles the settlement of which is of public importance, nor does it involve a "real and embarrassing conflict of authority" among the Circuits. As has been shown, there is no such conflict among the Courts of Appeals as to the standard for supervisor liability under § 1983. Accordingly, the petition must be denied.

In addition, Harel's petition must be denied because his contentions concerning application of a deliberate indifference standard are moot due to his failure to prove an underlying constitutional violation. This Court held in *Daniels v. Williams*,

474 U.S. 327, 330 (1986), that "[i]n any given § 1983 suit, the plaintiff must . . . prove a violation of the underlying constitutional right. . . . *See e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (Invidious discriminatory purpose required for claim of racial discrimination under the Equal Protection Clause.)."

Here, however, Harel has failed to produce competent evidence to show the existence of the underlying constitutional violation — that he was discriminatorily denied promotion and tenure because of his Israeli national origin by respondents' subordinates. At this stage of these proceedings, Harel's contention appears to be that respondents Lawrence and Seneca are personally liable for alleged intentional discriminatory conduct by evaluators beneath them in the 1995 evaluation process which purportedly resulted in the unlawful denial of his bid for tenure and promotion. In the proceedings below, the district court applied the three-part test for proving disparate treatment established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and correctly concluded that Harel had not met his burden of producing evidence indicating that respondents Seneca and Lawrence discriminated against him on account of his Israeli national origin (Pet. App. C-41). Further, the district court rejected Harel's assertions that irregularities in the evaluation process showed that Rutgers' non-discriminatory reason for denying Harel promotion and tenure (the University's view that the quantity and impact of his scholarship did not meet its standards for promotion) was a mere pretext for discrimination or that an invidious discriminatory reason more likely than not motivated the University's decision not to grant tenure (Pet. App. C-39-41). These determinations were affirmed by the Third Circuit (Pet. App. A-4), and have not been challenged in Harel's petition. Plainly, the lower courts' decisions dismissing Harel's

§ 1983 discrimination claims against Rutgers prevent him from establishing that a constitutional tort was committed by Rutgers for which respondents Lawrence and Seneca may be held personally liable as supervisors.

Harel's petition also must be denied because his contentions are premised upon serious misstatements of fact. Throughout his petition, Harel asserts either that respondents Lawrence and Seneca knew or that they should have known that the proceedings at the lower levels of the 1995 evaluation process were infected by anti-Israeli bias because of allegedly rampant irregularities that purportedly occurred in the 1993 and 1995 evaluation processes. The evidence shows, however, that Harel's 1993 grievance resulted in only a single grievance committee finding of "enmity" which was remedied by the recusal of the offending professor from the 1995 evaluation (Pet. App. C-9 - C-10; JA186, 195). Moreover, the evidence clearly shows that Harel never contended that his Israeli national origin had anything whatever to do with his tenure denial until he filed his EEOC Charge of Discrimination in September 1995 (Pet. App. C-9, C-13 and C-15), months after the 1995 evaluation concluded. Therefore, nothing that occurred prior to the 1995 remanded tenure evaluation reasonably could have led respondent Lawrence or respondent Seneca to suspect that national origin discrimination had affected Harel's evaluation.

With regard to the 1995 evaluation, Harel contends that respondent Seneca opposed his tenure bid despite the fact that he "knew that the FAB, the highest-level University grievance panel, had identified a myriad of procedural and substantive deficiencies adversely affecting Petitioner's tenure review process" (PW 16 -17). The undisputed evidence shows this allegation to be false. The evidence shows that Dr. Seneca's involvement with Harel's 1995 tenure review ended on March

25, 1995 with his memorandum reporting the PRC's recommendation to the President (Pet. App. C-12; JA 208, 2006). At that time, in March of 1995, it was impossible for Dr. Seneca to know that Harel would later file a grievance in May of 1995 (Pet. App. C-12), or to know the contents of the FAB's then non-existent report, which subsequently issued on June 22, 1995 (Pet. App. C-13). Moreover, the evidence shows that the FAB ultimately rejected Harel's principal allegations (Pet. App. C-13 - C-14). Therefore, Harel's assertion that the FAB's findings provided Dr. Seneca with knowledge of alleged procedural irregularities is false. Further, as the district court's rulings amply demonstrate, Harel never produced evidence sufficient to support a rational inference that national origin discrimination played a role in the tenure denial.

Similarly, Harel falsely attempts to ascribe to respondent Lawrence knowledge which he simply could not have had. For example, Harel contends that respondent Lawrence "rejected his candidacy and recklessly ratified the discrimination previously internalized in the process" despite knowledge that Harel believed that the adverse decisions had been motivated by illegal discrimination (PW19). Harel has produced no evidence which establishes that respondent Lawrence knew, or could have known, that Harel believed his tenure denial was the result of illegal discrimination. At no time during the tenure review process or in his grievance to the FAB did Harel make such an allegation (Pet. App. C-13). The record is absolutely clear on this point. When respondent Lawrence ended his involvement in this matter upon notifying Harel on July 26, 1995 that he was not being granted tenure, Harel had yet to contend that his tenure denial was the product of illegal discrimination. As shown, it was not until months later, on September 13, 1995, in his Charge of Discrimination to the EEOC, that Harel first contended that he had been denied tenure

and promotion due to discrimination on the basis of his national origin (Pet. App. C-15). Thus, Harel's allegation that respondent Lawrence recommended against Harel's promotion candidacy despite knowledge that Harel claimed to be a victim of illegal discrimination is contradicted by the evidence.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari must be denied.

Respectfully submitted,

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